
PROTECTING POWERS

❖ Text of the provision*

- (1) The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.
- (2) The Parties to the conflict shall facilitate, to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers.
- (3) The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted, as an exceptional and temporary measure, when this is rendered necessary by imperative military necessities.

❖ Reservations or declarations

None

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A. Introduction

- 1003 Article 8 regulates the appointment, role and functioning of the Protecting Powers. This provision is common to the four Conventions.¹
- 1004 The Diplomatic Conference of 1949 made the Protecting Powers the lynchpin of the system for monitoring compliance with the Geneva Conventions in international armed conflict. Indeed, concluding a treaty implies a minimum of mutual trust; implementing it requires a minimum of mutual scrutiny. After all, what State would agree to fulfil in good faith the commitments it has undertaken if it is not convinced that its enemies will do the same?
- 1005 In peacetime, it is up to diplomatic and consular missions to keep their government informed of how the receiving State is observing its commitments vis-à-vis the sending State. In the event of a failure to fulfil those obligations, the sending State may use diplomatic channels to assert its rights.
- 1006 Common Article 8 (Article 9 in the Fourth Convention) is based on the assumption, largely supported by State practice at the time of the 1949

¹ Article 8 of the First, Second and Third Conventions and Article 9 of the Fourth Convention.

Diplomatic Conference, in particular during the two world wars, that war implies the breaking off of both diplomatic and consular relations. Nowadays, this assumption is not always valid as there have been instances where Parties to an international armed conflict have maintained such relations. However, even then, most members of the diplomatic and consular missions of the Parties to the conflict had been withdrawn and the freedom of movement of those remaining severely restricted, so that they were no longer in a position to observe and report on the way the State of residence was respecting its obligations towards the sending State, nor to provide effective protection to the latter's nationals. Can it be expected that a treaty will be respected in such circumstances?

- 1007 This difficulty was not foreseen by the drafters of the 1864 Geneva Convention, which was the starting point for international humanitarian law as we know it today. They had planned to rely on the vigilance of the commanders-in-chief to oversee the implementation of the new treaty, whose Article 8 provided that:

The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.²

- 1008 Accordingly, the new Convention did not establish any mechanism for supervising the implementation of its provisions. It was thought that all States would be keen to ensure their own compliance with the treaty and that none would risk, by violating its provisions, being banished from what were referred to at the time as the 'civilized nations'.
- 1009 But those expectations were soon confounded. During the 1870–71 Franco-Prussian War – the first conflict during which the new Convention was in force – the Parties to the conflict accused each other of violating its provisions. This was a situation that would be repeated in subsequent conflicts.
- 1010 Humanitarian law, which had not initially made provision for any mechanism to supervise its implementation, turned instead to an institution enshrined in diplomatic law.
- 1011 It was accepted that a State that was not represented in a given country could ask another Power that was represented in that country to safeguard its interests and those of its citizens. The same was true if diplomatic relations were broken off, particularly in wartime, in which case this role extended to monitoring the fate of soldiers and civilians who had fallen into enemy hands – whether sick or wounded soldiers and members of the medical services protected by the Geneva Convention, prisoners of war or civilians held by the adverse Party.

² Nowadays, see Article 45 of the First Convention and Article 46 of the Second Convention.

- 1012 This system became further consolidated in the second half of the 19th century, but it was during the two world wars that the work of the Protecting Powers saw the biggest growth in scope.
- 1013 By stipulating that the new Conventions would be implemented ‘with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict’, the Diplomatic Conference of 1949 made it compulsory to rely on Protecting Powers to monitor their implementation. With a view to making sure that those protected by the new Conventions were not left without protection, the Conference also provided for a substitution mechanism in case no Protecting Power was appointed.³
- 1014 Practice since 1949 has not developed in the direction envisioned by the drafters of the Geneva Conventions: the appointment of Protecting Powers in case of an international armed conflict has been the exception rather than the rule. Seemingly, practice since 1949 has evolved to the point of considering the appointment of Protecting Powers as optional in nature. This does not preclude, however, that Protecting Powers may still be appointed in future international armed conflicts on the basis of Article 8.
- 1015 Since humanitarian law borrowed the Protecting Power system from diplomatic law, this provision is only applicable in international armed conflicts. Neither common Article 3 nor Additional Protocol II make any mention of a role for Protecting Powers in non-international armed conflicts. Nothing precludes Parties to such a conflict, however, from concluding a special agreement to put into place a system akin to that of Protecting Powers.⁴

B. Historical background

1. *Practice until the Second World War*

- 1016 Throughout history, States have entrusted their diplomatic and consular staff with the task of safeguarding their interests and those of their citizens in the receiving State. This is a mission fully recognized by treaty and customary law.⁵
- 1017 However, this activity is not always limited to protecting the nationals of the sending State. It may be that a State (known as the ‘Power of Origin’) entrusts another State (known as the ‘Protecting Power’) with safeguarding its interests and those of its nationals in a country where it is not itself represented (the ‘receiving State’).

³ See common Article 10 (Article 11 of the Fourth Convention).

⁴ On the topic of special agreements in a non-international armed conflict, see the commentary on common Article 3, section K.

⁵ According to Article 3 of the 1961 Vienna Convention on Diplomatic Relations:

1. The functions of a diplomatic mission consist, *inter alia*, in:

...
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.

- 1018 This function came about in the 16th century, at a time when permanent diplomacy was becoming more widespread. Only the great Powers had the financial means to maintain embassies. To make sure that their nationals were given protection, smaller States agreed to entrust this task to other States.⁶ There are still today many cases in which States ask another State to represent them and protect their interests in countries where they are not represented.⁷
- 1019 Similarly, if diplomatic relations were broken off, it was accepted that a State could request a third State to safeguard its interests and protect its nationals in the country where it was no longer represented.⁸ This included safeguarding the interests of foreign nationals in wartime and, in particular, protecting persons held by the enemy. This practice gained broad acceptance in the second half of the 19th century⁹ and became increasingly widespread during the First World War.¹⁰ Following negotiations in late 1914 and into 1915, representatives of the Protecting Powers were granted permission to visit prisoner-of-war camps. Their representations – and those of the ICRC, undertaken at the same time – helped break the cycle of retaliations and counter-retaliations in which the Parties had become trapped and brought about major improvements for the prisoners.¹¹
- 1020 The Diplomatic Conference of 1929 paid tribute to the work of the Protecting Powers during the First World War by setting out a legal basis for their actions in future. Article 86 of the 1929 Geneva Convention on Prisoners of War provided in its first paragraph that:

The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the *possibility* of collaboration between the protecting Powers charged with the protection of the interests of the belligerents; in this connexion, the protecting Powers may, apart from their diplomatic personnel, appoint delegates from among their own nationals or the nationals of other neutral Powers. The appointment of these delegates shall be subject to

⁶ See Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 87; Franklin, pp. 8–9; and Siordet, pp. 4–5.

⁷ For example, Italy represents San Marino in many countries, while Switzerland represents Liechtenstein in countries where the Principality is not represented (Salmon, p. 118).

⁸ Thus, Switzerland represented the interests of the United States in Cuba from 1961 to 2015 and in Iran since 1980, those of Iran in Egypt (since 1979), those of Russia in Georgia (since 2008) and those of Georgia in Russia (since 2009). For further details, see <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/human-rights/peace/protective-power-mandates.html> and 'La diplomatie suisse en action pour protéger des intérêts étrangers', *Politorbis*, No. 56, 2014.

⁹ Franklin, pp. 30–88; Wyler, pp. 23–39. ¹⁰ Franklin, pp. 88–104 and 243–256.

¹¹ US diplomats posted to Berlin and London played a key role in these negotiations because of the privileged position of the United States, which simultaneously represented UK interests in Germany and German interests in the British Empire. See *Papers relating to the Foreign Relations of the United States*, 1914, Supplement, The World War, United States Government Printing Office, Washington, 1928, pp. 731–756, and *Papers relating to the Foreign Relations of the United States*, 1915, Supplement, The World War, United States Government Printing Office, Washington, 1928, pp. 997–1023.

the approval of the belligerent with whom they are to carry out their mission.¹² [Emphasis added.]

- 1021 This provision did not place any obligations on the High Contracting Parties; it was nevertheless to prove extremely useful during the Second World War, when most of the belligerents called upon the services of a Protecting Power. Switzerland protected the interests of 35 States, including most of the major Powers: the British Empire (in relation to 11 States or territories), France (17), United States (12), Germany (15), Japan (15) and Italy (14). Sweden protected the interests of 28 States, including the USSR. And the United States, prior to joining the war, represented a dozen States.¹³
- 1022 However, major difficulties became apparent. There were no treaty-based provisions authorizing the Protecting Powers to act on behalf of enemy civilians. No provision was made for Protecting Powers to take action in occupied territory; thus Japan, for example, declared all the territories it occupied to be zones of military operation and refused the Protecting Powers access to them.¹⁴ Lastly, the work of the Protecting Powers was not accepted when it was to be performed on behalf of governments without official recognition (such as the Allied Governments in exile that were not recognized by Germany).¹⁵

2. Preparatory work for the 1949 Conventions

- 1023 The above mentioned difficulties prompted the ICRC, when it initiated preparations for the adoption of new Geneva Conventions in the aftermath of the Second World War, to set itself the following objectives: to extend to all four Conventions the supervision exercised by the Protecting Powers; to make such supervision compulsory; and to make arrangements for providing a substitute in the absence of a Protecting Power.¹⁶
- 1024 The war had brought to light in a dramatic way two very different situations: when the Geneva Convention on Prisoners of War had been implemented with the backing of a Protecting Power, its provisions (or at least the key ones) had largely been respected; whereas, when the supervision of a Protecting Power had been lacking, serious abuses had taken place. The three objectives the ICRC set itself found widespread support when it came to the negotiations that resulted in the adoption of the new Geneva Conventions.
- 1025 The question of supervising the implementation of the Geneva Conventions was brought first before the Preliminary Conference of National Societies, which took place in Geneva in 1946. However, the Conference focused on the

¹² For the legislative history of Article 86 of the 1929 Geneva Convention on Prisoners of War, see Bugnion, 2003, p. 855, fn. 6.

¹³ Franklin, pp. 261–277; Janner, pp. 68–70. ¹⁴ Janner, pp. 17 and 27. ¹⁵ *Ibid.* pp. 21–22.

¹⁶ Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 92. See also de La Pradelle, 1951, pp. 221–225 and 234–243.

ICRC's role and requested that ICRC delegates enjoy the same rights and remit as the representatives of the Protecting Powers.¹⁷ Otherwise, the Conference merely underlined the importance of supervising the implementation of the new Conventions and of punishing violations of their provisions.¹⁸

- 1026 The issue was then addressed by the 1947 Conference of Government Experts. The main focus was on revising Article 86 of the 1929 Geneva Convention on Prisoners of War. The crux of the discussion was the possibility of a procedure for appointing a substitute in the absence of a Protecting Power, and the ICRC's role in supervising the implementation of the Geneva Conventions.¹⁹ The Conference also found that the words 'as a general rule' in Article 86(2) of the Convention on Prisoners of War, which had been seized upon to restrict the activities of delegates of Protecting Powers, particularly in the Far East, should be deleted. The Conference also raised and then rejected the possibility of delegates of Protecting Powers being permanently based in prisoner-of-war camps, and instead placed the emphasis on short-term visits. For the Conference, therefore, it was these visits and the possibility of holding interviews without witnesses with the prisoners that was foreseen as the cornerstone of the implementation of the new Conventions. This function was to be entrusted to the Protecting Powers.²⁰
- 1027 In relation to the protection of civilians, the Conference envisaged the Protecting Powers' involvement in a wide range of specific areas, including dealing with voluntary applications for internment, processing appeals against internment decisions, and supervising transfers and evacuations. However, despite the atrocities committed during the Second World War, particularly against populations in occupied territories, it does not seem that the Conference envisaged giving Protecting Powers a general mandate to work towards the implementation of, and compliance with, any new convention for the protection of civilians in wartime – something that had been so sorely lacking during the Second World War.²¹
- 1028 In the draft conventions submitted to the 17th International Conference of the Red Cross, held in Stockholm in 1948, the ICRC inserted the following draft common article:

The present Convention shall be applied with the co-operation and under the control of the Protecting Powers, whose duty it is to safeguard the interests of the Parties to the conflict. To this end, the Protecting Powers may appoint, besides their diplomatic staff, delegates among their own nationals, or among nationals of

¹⁷ *Report of the Preliminary Conference of National Societies of 1946*, pp. 73–74.

¹⁸ *Ibid.* p. 68.

¹⁹ For the appointment of substitutes, see common Article 10 (Article 11 in the Fourth Convention).

²⁰ *Report of the Conference of Government Experts of 1947*, pp. 262–268.

²¹ For a complete overview of the discussions on these aspects, see *ibid.* pp. 284–347, in particular at 298–300 and 304–305.

other neutral Powers. These delegates shall be subject to the approval of the Power in whose territory they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.²²

- 1029 When this draft was studied by the Legal Commission of the Stockholm Conference, the Canadian Government's representative spoke out against the fact that the French word 'contrôle' had been translated by 'control' in English. He pointed out that the term 'control' in English was much stronger than its French equivalent and, if it were to be kept, it would give the impression that the Protecting Power was entitled to direct the actions of one of the Parties to the conflict. Following this discussion, the Stockholm Conference replaced the word 'control' in English by 'supervision', while keeping the word 'contrôle' in French at the ICRC's request. Subject to this change, the Conference agreed to the ICRC's proposals without hesitation.²³
- 1030 During the 1949 Diplomatic Conference, the task of studying draft article 6/7/7/7 was entrusted to the Conference's Joint Committee, which was responsible for considering all the draft articles common to the four Conventions. The discussions mainly focused on two points.
- 1031 First, the delegations from English-speaking countries objected to the aforementioned translation of the term 'contrôle' in the first sentence of draft article 6/7/7/7 by 'supervision'. In their view, this accorded the Protecting Power the right to give the Detaining Power or the Occupying Power instructions with which the latter would be obliged to comply. This, they believed, far exceeded the role of the Protecting Power as it had developed in practice during the two world wars. After hesitating between several translations, the Conference finally settled on the term 'scrutiny'.²⁴ This discussion is interesting because it offers an insight into the meaning that the Diplomatic Conference intended to give to the terms 'contrôle' and 'scrutiny' in the first sentence of Article 8.
- 1032 Second, the Soviet delegation tabled an amendment stipulating that the delegates of the Protecting Power may not infringe the sovereignty of the receiving State. The amendment was put to the vote and rejected because many delegations feared that the reference to national sovereignty would be invoked to arbitrarily limit the activities of the Protecting Powers and nullify the scrutiny that the Diplomatic Conference wished to establish.²⁵
- 1033 However, the Committee which examined the draft article deemed it advisable to offer the receiving State some safeguards for dealing with the

²² *Draft Conventions submitted to the 1948 Diplomatic Conference*, draft common article 6/7/7/7, pp. 8, 36, 56 and 156.

²³ *Minutes of the Legal Commission at the 1948 Stockholm Conference*, pp. 70–73; *Draft Conventions adopted by the 1948 Diplomatic Conference*, pp. 11, 33, 54 and 115–116.

²⁴ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 18–20, 57–59, 89 and 110–111.

²⁵ *Ibid.* pp. 28–29, 38, 57–59, 74, 89, 110–111 and 130.

Protecting Power. It therefore agreed to add what has become, with editorial changes only, paragraph 3 of Article 8.²⁶ One sentence in this paragraph, however, only appears in the First and Second Conventions, but has been deliberately removed from the text of the Third and Fourth Conventions.²⁷

C. Sources of international law governing Protecting Powers

- 1034 The status and duties of Protecting Powers are governed essentially by customary law and by two groups of treaties: (i) treaties of international humanitarian law, in particular the 1949 Geneva Conventions and the 1977 Additional Protocol I,²⁸ and (ii) treaties of diplomatic and consular law, in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, as well as the 1969 Convention on Special Missions.²⁹
- 1035 On this basis, a distinction is usually made between the 'Geneva mandate', which sets out the duties of the Protecting Powers under humanitarian law, and the 'Vienna mandate', which sets out the activities arising more specifically from diplomatic and consular law and practice.³⁰ Both have in common that, on the basis of Article 45 of the Vienna Convention on Diplomatic Relations,

²⁶ *Ibid.* p. 111. ²⁷ For details, see paras 1111–1113.

²⁸ Common Article 8 (Article 9 in the Fourth Convention) and Article 5 of Additional Protocol I. Article 2(c) of Protocol I defines 'Protecting Power' as 'a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol'. The mechanisms established by Articles 21–22 of the 1954 Hague Convention for the Protection of Cultural Property are largely inspired by those of the Geneva Conventions.

²⁹ See Vienna Convention on Diplomatic Relations (1961), Articles 45(b)–(c) and 46. Article 45(b)–(c) reads:

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

...

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46 reads:

A sending State may with the prior consent of the receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 27 of the 1963 Vienna Convention on Consular Relations establishes similar rules to be applied if consular relations are broken off. Article 1(a) of the 1969 Convention on Special Missions defines a 'special mission' as 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.'

³⁰ This distinction is also reflected in the last sentence of Article 4(B)(2) of the Third Convention: '[T]he Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.'

the tasks of the Protecting Power may be performed by that Power's diplomatic officials. Therefore, they will be subject to diplomatic law.

1036 Yet the distinction between the 'Geneva mandate' and the 'Vienna mandate' matters in several instances. First, when diplomatic relations are broken off between two States without there being an international armed conflict in the sense of the Geneva Conventions between them,³¹ only the Vienna mandate may be applicable. Furthermore, some of the tasks of the Protecting Power on the basis of the Vienna mandate are not found in the Geneva Conventions, for instance the protection of the premises and archives of the mission, as provided for in Article 45(b) of the Vienna Convention on Diplomatic Relations.³²

1037 Another scenario in which the distinction matters is when an international armed conflict breaks out, but the States involved maintain diplomatic relations. In that case, there may be no need to appoint a Protecting Power in the sense of the Vienna Convention on Diplomatic Relations. However, because of the armed conflict, it would still be useful to appoint a Protecting Power in the sense of the Geneva Conventions.³³ Indeed, even where diplomatic or consular staff remain, they are still likely to have their freedom of movement restricted.³⁴ More generally, in practice it will be very difficult to implement all the provisions of diplomatic law, which are mostly designed for peacetime situations.³⁵

³¹ For examples, see Lord Gore-Booth (ed.), *Satow's Guide to Diplomatic Practice*, 5th edition, Longman, London, 1979, p. 188, and Salmon, pp. 499–502.

³² For the text of that provision, see fn. 29.

³³ Additional Protocol I, Article 5(6), which makes it clear that '[t]he maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol'. On this point, see Kolb, p. 551.

³⁴ During the 1962 international armed conflict between India and the People's Republic of China, for example, the ICRC pointed out that – despite diplomatic relations being maintained between the two countries – neither the Indian prisoners of war in China nor the Chinese civilian internees in India had been visited by representatives of their countries of origin; see *International Review of the Red Cross*, Vol. 3, No. 24, March 1963, p. 149, and ICRC, *Annual Report 1962*, ICRC, Geneva, 1963, p. 27.

³⁵ See Eritrea-Ethiopia Claims Commission, *Diplomatic Claim, Eritrea's Claim*, Partial Award, 2005, paras 4–6:

4. ... [A]t the outset, the Commission wishes to stress the Parties' commendable decisions not to sever diplomatic links despite the armed conflict. One need only recall Oppenheim to appreciate the truly exceptional character of this situation.

...

6. ... [T]his unusual situation has created unusual challenges for the application of diplomatic law. Certain of the core functions of a diplomatic mission – for example, 'promoting friendly relations between the sending State and the receiving State' as set out in Article 3, paragraph (c), of the Vienna Convention on Diplomatic Relations – become obviously incongruous in wartime. Certain of the premises of effective diplomatic representation – for example, free travel, for access, intelligence gathering, ability to influence public opinion – cannot be presumed to continue without strain during hostilities.

See also Smolinska/Boutros/Lozanorios/Lunca, pp. 93–94.

- 1038 Until at least the Second World War, the outbreak of war between two States was generally considered to automatically imply the breaking off of diplomatic relations between those States.³⁶ Nowadays, however, 'the situation is less clear when an armed conflict takes place without a formal declaration of war. ... [C]ontrary to a declared war, an armed conflict does not necessarily induce by itself the breaking off of diplomatic relations. This has the advantage of leaving the countries concerned with the possibility of keeping in diplomatic contact over the issues at stake.'³⁷ In practice since 1949, while it has happened that States maintained diplomatic relations despite their being adversaries in an international armed conflict, such relations have been broken off at the outset of, or during, a number of other such conflicts.³⁸ Lastly, there have also been instances where an international armed conflict has broken out between States which did not have diplomatic relations at the time of the outbreak.³⁹ In all these instances, the continued usefulness of appointing Protecting Powers goes without saying.
- 1039 The question of whether an international armed conflict automatically leads to the breaking off of diplomatic relations needs to be kept separate from the question of whether the outbreak of such a conflict has any impact on the continued applicability between them of the Vienna Convention on Diplomatic Relations: whether or not diplomatic relations have been broken off between the Parties to the conflict, that Convention remains applicable.⁴⁰
- 1040 When an international armed conflict breaks out between two States *and* diplomatic relations are broken off between those same States, the distinction loses its legal bearing in practice if Protecting Powers are appointed in the sense of the Geneva Conventions. The way State practice developed over time, particularly during the two world wars, meant that the mandate of the Protecting Powers formed a cohesive whole: where Protecting Powers are appointed in the sense of the Geneva Conventions, the officials of the Protecting Power will be

³⁶ See Oppenheim, p. 301, para. 98; see also Sfez, p. 388, and Papini/Cortese, pp. 137–138.

³⁷ See Ludwik Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations*, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 96. On the concept of declared war, see the commentary on common Article 2, section D.1.

³⁸ On the breaking off of diplomatic relations, see Sfez, p. 361, and Smolinska/Boutros/Lozanorios/Lunca, p. 108.

³⁹ Salmon, p. 498, listing international armed conflicts in which the States involved broke off their diplomatic relations, and international armed conflicts in which the States involved maintained them. See also Smolinska/Boutros/Lozanorios/Lunca, p. 92, and Papini/Cortese, p. 138. See also fn. 35 regarding the conflict between Eritrea and Ethiopia.

⁴⁰ See e.g. Vienna Convention on Diplomatic Relations (1961), Articles 44 and 45(a), and Vienna Convention on Consular Relations (1963), Articles 26 and 27(a). See also ILC, *Draft articles on the effects of armed conflicts on treaties, with commentaries*, 2011, pp. 11, 20 and 38–40, which lists 'treaties relating to diplomatic or consular relations' among the 'treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict', and Fifty-seventh session, 'The effect of armed conflict on treaties: an examination of practice and doctrine', Memorandum by the Secretariat, UN Doc. A/CN.4/550, 1 February 2005, p. 25.

largely occupied with the duties common to both the Geneva mandate and the Vienna mandate.

- 1041 The drafting of Article 8 clearly shows that the 1949 text intended to preserve the unity of the Protecting Power's mandate since it stipulated that the new Conventions would be implemented 'with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict'. The fact that that mandate is now enshrined in two different legal instruments does not alter the fact that these mandates were meant to be cohesive.
- 1042 Indeed, Article 45(c) of the Vienna Convention on Diplomatic Relations stipulates that, if diplomatic relations are broken off, '[t]he sending State may entrust the protection of its interests *and those of its nationals* to a third State acceptable to the receiving State' (emphasis added). In wartime, those nationals whose interests need protecting include wounded and sick members of the armed forces, prisoners of war and civilians in the hands of the adverse Party – in other words, those protected by the Geneva Conventions. Where Protecting Powers are appointed, the two mandates therefore overlap to a large extent. Of course, international humanitarian law will contain the more detailed rules with regard to the tasks the Protecting Power can perform for the protection of the victims of the international armed conflict.

D. Appointment of Protecting Powers

- 1043 The first sentence of Article 8(1) stipulates that '[t]he present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict'.
- 1044 The use of the word 'shall' indicates that the appointment of the Protecting Powers is not an optional form of assistance available to the Parties to an international armed conflict, but an obligation.⁴¹ In 1949, as was also the case for Article 5 of Additional Protocol I when adopted in 1977, it is clear that this was the intention of the drafters.
- 1045 Over the decades since 1949, however, States have come to a different understanding of this provision. As discussed below (see section H), the appointment of Protecting Powers since 1949 has been the exception rather than the rule in international armed conflicts. Absent any protest, therefore, it would seem that the failure to appoint a Protecting Power is not, at least in the eyes of most States, seen as a violation of their treaty obligations.⁴² At the same time, there

⁴¹ The French text is equally clear. It reads: 'La présente Convention sera appliquée avec le concours et sous le contrôle des Puissances protectrices.'

⁴² See also Kolb, p. 559: 'state practice has turned the original duty to nominate a Protecting Power into a *mere option*'; see also p. 552.

is no indication that the High Contracting Parties consider that Article 8 has fallen into desuetude.⁴³

- 1046 Article 10, dealing with the appointment of substitutes for Protecting Powers, was not conceived by the drafters of the Geneva Conventions as an alternative to Article 8. Indeed, Article 10 was essentially meant to cover situations in which no Protecting Power could be appointed, for example because of the disappearance of the Power of Origin or because the latter could no longer fulfil its duties.⁴⁴ The existence of Article 10, therefore, may not be used as an argument to corroborate the view that the system of Protecting Powers is defunct.
- 1047 The Conventions do not set out a procedure for the appointment of Protecting Powers. That said, humanitarian law did not create the Protecting Powers system; it simply called upon an institution that was already well established in diplomatic and consular practice. It is therefore customary law, arising from this practice, that provides this procedure. This also explains why only a State can be appointed as a Protecting Power under Article 8.
- 1048 The appointment of a Protecting Power presupposes the conclusion of two agreements: one between the Power of Origin and the Protecting Power; and the other between the Protecting Power and the receiving State. No agreement between the opposing High Contracting Parties is necessary.

1. Agreement between the Power of Origin and the Protecting Power

- 1049 No State can name itself Protecting Power on its own initiative. At the same time, nothing prevents a State from approaching a Party to a conflict to propose itself as a Protecting Power. The Protecting Power must receive from the State that calls upon its services a mandate that sets out the scope of the protection it may exercise. It acts by delegation, meaning that it can only, as a general rule, act within the rights to which the State it represents is entitled. Lastly, it is expected that the State represented will not entrust to the Protecting Power tasks that would clearly be detrimental to the latter's interests.⁴⁵
- 1050 The Protecting Power may not exceed the terms of the mandate entrusted to it. It has also traditionally been expected to regularly submit reports to the Power of Origin on its activities and the situation of that State's nationals in the receiving State.⁴⁶ When and how such reports are to be submitted

⁴³ See *ibid.* pp. 558–559:

Overall, there is an impressive array of reasons that explain why the institution of Protecting Powers has fallen into disuse. Legally, this clearly does not connote any idea of obsolescence or desuetude. The legal institution of Protecting Power has not, to any extent, been abrogated. Hence, a state could perfectly well appoint a Protecting Power today and seek the agreement of the opposing Party.

⁴⁴ See the commentary on Article 10, para. 1211. ⁴⁵ Franklin, pp. 119–124; Janner, pp. 11–15.

⁴⁶ Janner, pp. 12–13. For military personnel, the 'Power of Origin' is the State in whose armed forces a person served before being rendered *hors de combat* by wounds, illness or capture; for

will depend on the agreement between the Power of Origin and the Protecting Power.

- 1051 A neutral State is not legally obliged to accept the mandate of Protecting Power when asked.⁴⁷ Nevertheless, diplomatic tradition and international comity dictate that, provided the receiving State agrees, neutral States will accede to such requests.
- 1052 However, shortly after the end of the Second World War, Switzerland unilaterally renounced its safeguarding of German interests in view of the disappearance of the Reich Government. Similarly, Switzerland refused to safeguard certain Japanese interests because it no longer enjoyed free communication with the Japanese Government, which was controlled by the Allied Powers at the time. These two examples show that, at least in Swiss practice, a Protecting Power's purpose depends on having a mandate from a government.⁴⁸
- 1053 Nothing in the Geneva Conventions or diplomatic law or practice obliges two States at war to appoint the same State as Protecting Power. Thus, in September 1939, the United Kingdom and France appointed the United States to safeguard their interests in Germany, while Germany called upon Switzerland to protect its interests in the United Kingdom, and on Spain to protect its interests in France.⁴⁹ Experience has shown, however, that if adversaries appoint the same State as Protecting Power, it is easier for that State to be effective than if it is appointed by just one of the Parties to the conflict. This is because it has an overview of the entire situation and can easily communicate with each adversary.⁵⁰

2. Agreement between the Protecting Power and the receiving State

- 1054 A State approached about being a Protecting Power cannot accept the mandate without the approval of the receiving State;⁵¹ generally speaking, it will even

civilians, the term refers to the State of which they are nationals, or, in the case of refugees or stateless persons, the State which granted them asylum.

⁴⁷ It might, however, be argued that the High Contracting Parties undertook, under common Article 1, 'to respect and to ensure respect for' the Conventions 'in all circumstances', and that this also imposes an obligation on neutral States to accept and discharge the mandate of Protecting Power if asked to do so. Nevertheless, a neutral State can always question why it was asked to take on this role rather than another State. For a discussion of which States qualify as 'neutral Powers', see the commentary on Article 4, section C.1.

⁴⁸ Janner, pp. 12 and 29–30.

⁴⁹ See Swiss Federal Council, Minutes of the session of 1 September 1939, *Documents diplomatiques suisses*, Vol. 13, 1991, pp. 331–332; *Journal de Genève*, 3 September 1939, p. 8, and 9 September 1939, p. 4; ICRC, *Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939–June 30, 1947), Volume I: General Activities*, ICRC, Geneva, May 1948, pp. 358–359; and Franklin, p. 267. After the United States entered the war, Switzerland took over most of the protection mandates carried out up to then by US diplomatic staff; Franklin, pp. 266–268.

⁵⁰ Note from J. de Saussure, Deputy Head of the Foreign Interests Division, Political Department, to D. Secretan, Head of the International Unions Section, Political Department, 22 January 1946, *Documents diplomatiques suisses*, Vol. 16, 1997, pp. 166–169, at 167; Janner, pp. 24–25 and 52.

⁵¹ Swiss Federal Council, Minutes of the session of 1 September 1939, *Documents diplomatiques suisses*, Vol. 13, 1991, pp. 331–332; Note from M. Pilet-Golaz, Head of the Political Department,

try to reach a formal agreement with that State guaranteeing that it will be able to satisfactorily perform the duties entrusted to it.⁵²

- 1055 The receiving State may refuse the services of the Protecting Power appointed by the adverse Party; it may not, however, act in such a way that the interests and nationals of another State are left without protection.⁵³ In international armed conflict, such an attitude would clearly run counter to Article 8 and to a number of specific provisions of the Geneva Conventions, in particular Article 126 of the Third Convention and Article 143 of the Fourth Convention.
- 1056 The appointment of the delegates of the Protecting Power must be approved by the Party to the conflict with which they will carry out their mission. The final sentence of Article 8(1) states that '[t]he said delegates shall be subject to the approval of the Power with which they are to carry out their duties'.
- 1057 This rule is in line with diplomatic law and practice, from where the Protecting Power system is derived. It enables the receiving State to reject a delegate's appointment if it has good reason to do so, for instance if the individual put forward had made statements casting doubt on his or her neutrality or impartiality.
- 1058 But this provision does not allow the receiving State to refuse all delegates appointed by the Protecting Power, because such an attitude would prevent the Protecting Power from fulfilling its mandate. Under Article 8(1), the States party to the Geneva Conventions undertake to implement the Conventions 'with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict'. Systematically refusing all the delegates appointed by the Protecting Power is tantamount to preventing it from carrying out its mission.
- 1059 With a view to fostering compliance with the Geneva Conventions, and aware that to do so it was essential to make available enough individuals capable of shouldering the task entrusted to the Protecting Powers of impartially scrutinizing the implementation of the Conventions, the 20th International Conference of the Red Cross in 1965 invited the States party to the Conventions to envisage the possibility of setting up groups of competent persons to supervise the implementation of the Conventions, and invited the ICRC to contribute to their training.⁵⁴ Subsequently, Article 6(1) of Additional Protocol

to D.V. Kelly, UK minister in Bern, 28 July 1941, *Documents diplomatiques suisses*, Vol. 14, 1997, pp. 263–264.

⁵² Franklin, pp. 124–134; Janner, pp. 16–18.

⁵³ Janner, p. 16; Heintze, para. 11: 'The permanent rejection of protection violates the minimum standards requirements concerning the treatment of aliens in international humanitarian law.' For examples, see Cahier, p. 138; Salmon, p. 122; and Smolinska/Boutros/Lozanorios/Lunca, p. 106.

⁵⁴ 20th International Conference of the Red Cross, Vienna, 1965, Resolution XXII, Personnel for the Control of the Application of the Geneva Conventions; Austrian Red Cross, *Twentieth International Conference of the Red Cross, Vienna, October 2–9, 1965, Report*, Vienna, 1965, pp. 78–79 and 106.

I required the High Contracting Parties to endeavour to train qualified personnel, in particular to carry out 'the activities of the Protecting Powers'.

3. *Terms of reference*

- 1060 Lastly, the appointment of a Protecting Power presupposes some common ground between the Parties to the conflict, at least when it comes to agreeing on the duties of the Protecting Power(s). Under humanitarian law, it is naturally the Geneva Conventions that are the basis for that mandate.⁵⁵ Additional duties beyond those outlined in Article 8 or in the Vienna Convention on Diplomatic Relations may be agreed upon in a special agreement between the Parties concerned. However, no bilateral agreement between the Parties is required for Protecting Powers to be appointed and take up their duties, nor is any direct communication between the Parties to the conflict necessary.

E. Paragraph 1: Duties of the Protecting Powers under the Geneva Conventions

1. *In general*

- 1061 Generally speaking, the mission of the Protecting Powers revolves around two tasks that emerge from the first sentence of Article 8(1): to cooperate in the implementation of the Geneva Conventions; and to scrutinize that implementation.

- 1062 While the duties of the Protecting Powers can be considered to be a form of 'diplomatic protection', they go beyond the specific definition of this notion as it appears in the ILC's 2006 Draft Articles on Diplomatic Protection. The Draft Articles define this notion 'for the purposes of the present draft articles' thus:

[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁵⁶

- 1063 In the above sense, 'diplomatic protection' is an action whereby a State attempts, after the facts, to have the responsibility of another State established for a violation, by that State, of a rule of international law applicable to it. The activities of a Protecting Power, on the other hand, are mostly preventive in nature: through scrutiny, the aim is to pre-empt violations. Lastly, a key requirement of 'diplomatic protection' in the sense of the Draft Articles is that '[a] State may not present an international claim in respect of an injury to

⁵⁵ See Dominicé, p. 431: '[W]hile its power to act as a Protecting Power is indubitably founded upon the particular mandate entrusted to it by a specific State, its responsibilities under the Geneva Conventions are assigned to it by all of the Contracting Parties.'

⁵⁶ Draft Articles on Diplomatic Protection (2006), Article 1.

a national... before the injured person has... exhausted all local remedies'.⁵⁷ This requirement does not apply to the activities of a Protecting Power, i.e. a Protecting Power may act, for example for the protection of a prisoner of war, without the prisoner of war having to have exhausted all local remedies.

a. Cooperation

1064 The idea of 'cooperation' implies that the Protecting Power should work with the Power of Origin of the protected persons and with the receiving State in order to implement the Geneva Conventions.

1065 The Protecting Power is supposed to provide a channel for communication between the Power of Origin and the receiving State. The Geneva Conventions contain several provisions stipulating that information about prisoners of war and about civilians protected by the Fourth Convention should be transmitted via the Protecting Power.⁵⁸ In other cases, however, the Geneva Conventions state that it is obligatory to transmit certain information without specifying the means of transmittal.⁵⁹ These omissions might be read to suggest that the Protecting Powers would only transmit information when it was expressly indicated that they should do so. But this interpretation would ignore the fact that the Diplomatic Conference of 1949 decided that the new Geneva Conventions would be implemented 'with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict'. This general obligation was enough, in the minds of the drafters of the Geneva Conventions in 1949, to make the Protecting Power the primary – but by no means the exclusive – channel for information exchange between the Parties to the conflict, without there being a need to remind the Parties each time that such an exchange could take place through the Protecting Powers. In addition, long before 1949 it had become regular practice for the Protecting Power to be a channel for communication between the Power which appointed it and the receiving State, for matters within both the Vienna mandate and the Geneva mandate. Thus, in October 1918 the Government in Berlin asked Switzerland – the Protecting Power for German interests in the United States – to pass on its request for an armistice to President Wilson. Switzerland thus became the intermediary for the negotiations that resulted

⁵⁷ *Ibid.* Article 14(1).

⁵⁸ Thus, Article 122(3) of the Third Convention states that all information regarding the identity, detention, transfer, release or death of a prisoner of war must be immediately forwarded by the most rapid means to his or her country of origin 'through the intermediary of the Protecting Powers and likewise of the Central Agency provided for in Article 123'. Article 137 of the Fourth Convention includes a similar provision regarding civilians protected by the Convention.

⁵⁹ Thus, Articles 22 and 24 of the Second Convention make the protection of military hospital ships and hospital ships utilized by National Red Cross or Red Crescent Societies or other officially recognized relief societies subject to the 'condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed', but do not specify by what channel that notification should be communicated to the adverse Party. The Protecting Powers, where they have been appointed, may be asked to undertake this task (Janner, p. 61).

in the armistice agreement of 11 November 1918.⁶⁰ Furthermore, the Protecting Power can be entrusted with passing on remittances or relief consignments from the Power of Origin to its nationals who are prisoners of war or civilian internees.⁶¹

- 1066 The Protecting Power mandate therefore encompasses the role of intermediary between the Parties to the conflict. The Protecting Power facilitates communication between the Parties and can also be called upon to lend its good offices in the event of disputes over the interpretation or implementation of treaty provisions⁶² or as part of reaching agreements that fill any gaps in humanitarian law or facilitate its implementation.⁶³
- 1067 While there is no evidence of the Protecting Powers organizing meetings between adverse Parties during the Second World War, they lent their good offices in order to reach agreements on improving the lot of the wounded, prisoners of war and civilians. Those agreements resulted in many repatriation operations for the seriously injured, medical personnel and civilians. The most significant operation in terms of numbers was the repatriation, while the hostilities were ongoing, of some 28,000 Italian civilians from Eritrea and Ethiopia following the defeat of Italian forces in Eastern Africa.⁶⁴
- 1068 In so far as the Protecting Power mandate encompasses the role of good offices, it also includes a right of initiative inherent to that role.⁶⁵ Offers made by the Protecting Power exercising this right can therefore under no circumstances be regarded as an unfriendly act.⁶⁶ But there are definite limits to this right of initiative, as Article 8 makes clear: 'The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention.'

b. Scrutiny

- 1069 The interpretation of the word 'scrutiny' is more complicated. However, the discussions that took place at the 1949 Diplomatic Conference concerning

⁶⁰ Pierre Renouvin, *La crise européenne et la Première Guerre mondiale*, 5th edition, Presses universitaires de France, Paris, 1969, p. 613. When it learned of the request of the German Government, the Swiss Federal Council observed that, since it represented German interests in the United States, it had a duty to follow through on that request straight away. Swiss Federal Council, Minutes of the session of 4 October 1918, *Documents diplomatiques suisses*, Vol. 6, 1981, pp. 799–800. The reaction of the Federal Council shows that, as far it was concerned, the Protecting Power mandate encompassed this role of neutral intermediary.

⁶¹ Janner, pp. 41–42 and 54. ⁶² See common Article 11 (Article 12 of the Fourth Convention).

⁶³ See e.g. Agreement between France and Germany concerning Prisoners of War (1918) and Second Agreement between France and Germany concerning Prisoners of War and Civilians (1918). These agreements were signed in Bern under the auspices of Switzerland. Switzerland had been responsible for protecting German interests in France since the United States entered the war. See Renée-Marguerite Frick-Cramer, 'Le Comité international de la Croix-Rouge et les Conventions internationales pour les prisonniers de guerre et les civils', *Revue internationale de la Croix-Rouge*, Vol. 25, No. 293, 1943, pp. 386–402, at 388–389.

⁶⁴ Janner, pp. 45–46.

⁶⁵ See e.g. Article 11 of the First Convention on the lending of good offices by Protecting Powers to settle disagreements between the Parties to a conflict.

⁶⁶ First Convention, Article 3(3).

the translation of the French word 'contrôle' clarified what was meant. The English-speaking delegations observed that the term 'supervision' – used to translate 'contrôle' in the draft conventions approved by the Stockholm Conference – would give the Protecting Power the right to issue instructions to the receiving State. By creating a hierarchical relationship, such a remit would exceed the limits of the Protecting Power mandate as it had developed in practice. Following those discussions, the term 'scrutiny' was chosen as the equivalent of the French 'contrôle'.⁶⁷

1070 The idea behind scrutiny was explained during the 1949 Diplomatic Conference as follows:

The fundamental concept was that the Protecting Power could not give orders or directives to the Detaining Power. It was entitled to verify whether the Convention was applied and, if necessary, to suggest measures on behalf of protected persons.⁶⁸

1071 Scrutiny implies that the Protecting Powers are entitled to know the condition of protected persons and report this information to their Power of Origin. This means that they have access to the people protected by the Geneva Conventions to assess whether those people are indeed treated in accordance with the relevant provisions of the Conventions. To this end, the Protecting Power's delegates or representatives must have access to all places of detention holding prisoners of war or civilians protected by the Third or Fourth Convention, respectively, who are nationals of the country whose interests the Protecting Power safeguards. And it must be granted permission to meet in private with those detainees. Furthermore, the Detaining Power has a duty to provide the Protecting Power with the information required to identify the prisoners of war and civilian internees, and to notify it of changes to their status, such as transfers, releases, repatriations, escapes, hospitalizations or deaths. The Protecting Power must also be kept informed of any legal action taken against a prisoner of war, protected by the Third Convention, or again a civilian protected by the Fourth Convention, and its representatives have the right to attend those proceedings. In addition, the Protecting Power's representatives are entitled to hear any complaints passed on to them by the representatives of the prisoners of war or by internee committees. The Third and Fourth Conventions refer to these tasks in great detail (see sections E.4 and E.5).

1072 Should the provisions of the Geneva Conventions be violated, the Protecting Power may be requested to communicate the protests of the Power of Origin of the protected persons. The Protecting Power may also make representations on its own initiative, particularly if the violation affects the rights

⁶⁷ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 57–58 and 110–111. For a definition of the French word 'contrôle', see also Jean Salmon, *Dictionnaire de Droit International Public*, Bruylant, Brussels, 2001, pp. 261–262. For the full discussion, see paras 1028–1031.

⁶⁸ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 110.

conferred upon it by the Geneva Conventions or its ability to carry out its duties thereunder.⁶⁹

1073 The words ‘cooperation’ and ‘scrutiny’, both of which appear in Article 8(1), therefore indicate the cooperative nature of the relationship between the receiving State and the Protecting Power: the receiving State agrees to take into account the observations of the Protecting Power, but the latter does not control the activity observed.

1074 In addition to the general scope indicated by the terms ‘cooperation’ and ‘scrutiny’, the Geneva Conventions entrusted specific tasks to, and therefore recognized the remit of, the Protecting Powers. Those tasks and remit are governed by many different provisions of the Geneva Conventions. The following paragraphs summarize the key elements of these provisions.

2. Tasks common to the four Geneva Conventions

1075 The main task of the Protecting Powers is to cooperate in implementing the Geneva Conventions and to scrutinize their application. To this end, they have an extensive remit, in particular the right for their representatives to visit all places of internment, detention and work where the adverse Party is holding wounded, sick or shipwrecked members of the armed forces, medical personnel, prisoners of war, and civilians protected by the Fourth Convention (Third Convention, Article 126; Fourth Convention, Article 143).

1076 In the event of a disagreement about the interpretation or application of the Geneva Conventions, the Protecting Powers lend their good offices with a view to settling the disagreement (common Article 11 (Article 12 in the Fourth Convention)).

1077 During hostilities, the Protecting Powers transmit the official translations of the Geneva Conventions, as well as the laws and regulations adopted to ensure their application (First Convention, Article 48; Second Convention, Article 49; Third Convention, Article 128; Fourth Convention, Article 145).

3. Tasks related to wounded, sick and shipwrecked members of the armed forces and medical personnel

1078 The Protecting Power may be involved in activities such as: (i) forwarding particulars to help in the identification of wounded, sick and shipwrecked members of the armed forces and information about the dead (First Convention, Articles 16 and 17; Second Convention, Articles 19 and 20); and (ii) notifying the adverse Party of the names of the relief societies authorized to assist the armed forces’ medical service (First Convention, Article 26), and of the employment of hospital ships (Second Convention, Articles 22, 24 and 25). The

⁶⁹ Thus, during the Second World War, the Swiss Delegation in Tokyo made more than 400 written representations about Allied prisoners of war and passed on 240 protests from the US Department of State (Janner, p. 51).

Protecting Power is invited to lend its good offices in order to facilitate the setting up and recognition of hospital zones and localities (First Convention, Article 23).

4. Tasks related to prisoners of war

- 1079 To scrutinize the implementation of the Third Convention, the Protecting Power's representatives may go to all places where prisoners of war may be, particularly to places of internment, imprisonment and work; they are also allowed to interview the prisoners, and in particular the prisoners' representatives, without witnesses (Article 126). The Protecting Power's representatives should receive records of the labour detachments dependent on the camps visited (Article 56). Furthermore, the Protecting Power's representatives may receive requests and complaints addressed to them by prisoners of war, as well as periodic reports from the prisoners' representatives (Article 78). All material facilities should be granted to prisoners' representatives for communication with the Protecting Power's representatives (Articles 79 and 81). Where the Detaining Power refuses to approve or dismisses a representative elected by his or her fellow prisoners of war, it must inform the Protecting Power of the reasons for such action (Article 79(4); Article 81(6)). Lastly, the Protecting Power should be notified of all the particulars required for the identification of prisoners of war, as well as information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths (Article 122); it must also be informed if an escaped prisoner is recaptured (Article 94).
- 1080 If prisoners of war are transferred from one Detaining Power to another, the Protecting Power must, if the Power to which they have been transferred fails to meet its obligations in any important respect, notify the Power which transferred the prisoners of war. This notification triggers that Power's obligation to take effective measures to correct the situation or request the return of the prisoners of war. Such requests must be complied with (Article 12).
- 1081 In terms of the financial resources of prisoners of war, the Protecting Power is involved in determining the maximum amount of money that prisoners may have in their possession (Article 58(2)), is informed of any limitations on that amount (Article 60(4)), and may inspect the prisoners' accounts (Article 65(2)).
- 1082 The Protecting Power must be consulted on the restrictions imposed on the correspondence of the prisoners of war (Article 71(1)) or on their relief shipments (Article 72(3)); it supervises the distribution of that relief (Article 73(3)), and may organize special shipments when the conveyance of relief is disrupted (Article 75). If necessary, the Protecting Power ensures the distribution of collective relief by any means that it deems useful (Annex III, Article 9).
- 1083 The Protecting Power's representatives may inspect the record of disciplinary punishments ordered against prisoners of war (Article 96(5)), and may talk freely to prisoners undergoing such punishment (Article 98(1)).

- 1084 The Protecting Powers' rights are particularly extensive in the area of criminal penalties applicable to prisoners of war. The Protecting Power must be informed as soon as possible of the offences which are punishable by the death sentence (Article 100(1)). It must be notified of any legal proceedings taken against prisoners of war (Article 104(1)), of judgments and sentences pronounced upon a prisoner of war (Article 107), especially in the case of the death penalty (Article 101), and of any appeals made by sentenced prisoners (Article 107(1)). If the death sentence is handed down, the sentence may not be carried out before a period of at least six months from the date when the Protecting Power receives the notification of this sentence (Article 101). If the accused does not appoint a legal counsel, it is up to the Protecting Power to do so (Article 105(2)). The representatives of the Protecting Power are entitled to attend the trial of the case, unless, exceptionally, this is held 'in camera' in the interest of State security (Article 105(5)). The representatives of the Protecting Power may visit sentenced prisoners (Article 108(3)).
- 1085 The Protecting Power should receive a report following the official enquiry into every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person (Article 121(2)).
- 1086 The Protecting Power also has a role to play with regard to the appointment of the neutral members of the Mixed Medical Commissions provided for in Article 112.⁷⁰
- 1087 Lastly, the Protecting Powers are intermediaries for passing on information regarding the geographical location of prisoner-of-war camps (Article 23(3)), the rate of working pay (Article 62(1)), payment notifications (Article 63(3)), lists of prisoners' credit balances (Article 66(1)), measures taken regarding correspondence (Article 71), legal documents (Article 77(1)) and wills (Article 120(1)). The Protecting Power should receive all the information required to identify prisoners of war and any information about a change in their status, namely transfers, releases, repatriations, escapes, admissions to hospital and deaths (Article 122(3) and (4)).

5. *Tasks related to civilians*

a. *In general*

- 1088 In order to scrutinize the implementation of the provisions of the Fourth Convention, representatives of the Protecting Power may go to all places where protected persons are, particularly to places of internment, detention and work.

⁷⁰ Third Convention, Annex II: Regulations concerning Mixed Medical Commissions, Articles 2 and 5.

They should have access to all premises occupied by protected persons and be able to interview them without witnesses (Article 143). The Protecting Power may receive any request or complaint addressed to it by protected persons (Article 30(1); Article 40(4); Article 52(1); and Article 101(2)). The Protecting Power must be informed of any measure taken concerning any protected persons who are kept in custody for more than two weeks, subjected to assigned residence or interned. It should also be informed of any changes in the status of protected persons, especially transfers, releases, escapes, births and deaths (Articles 136–137).

- 1089 As regards protecting the civilian population from the effects of war, the Protecting Power is invited to lend its good offices in order to facilitate the setting up and recognition of hospital and safety zones and localities (Article 14(3)). The Protecting Power may be entrusted with transmitting information about the establishment of neutralized zones (Article 15(1)). It may also be called upon to appoint the members of the special commissions responsible for checking whether the hospital and safety zones meet the conditions and obligations set out in Annex I of the Fourth Convention (Draft Agreement relating to Hospital and Safety Zones and Localities, Article 10).
- 1090 The Protecting Power may be called upon to supervise the distribution of shipments of medical supplies and objects for religious worship intended only for civilians, as well as consignments of foodstuffs, clothing and tonics intended for women and children (Article 23(3)).
- 1091 In order to protect from the effects of the hostilities children under 15 orphaned or separated from their families as a result of the war, the Parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict. This can only be done with the consent of the Protecting Power, if any (Article 24).

b. Foreign nationals in the territory of the Parties to the conflict

- 1092 As a general rule, the Protecting Power should be informed of the reasons for refusing a protected person's request to leave the territory of a Party to the conflict, and be given the names of those denied permission to leave (Article 35(3)). The Protecting Power should be given the names of any civilians who have been interned or subjected to assigned residence, and be notified of any legal and administrative decisions about their cases (Article 43(2)). The Protecting Power passes on voluntary applications for internment (Article 42(2)).
- 1093 The Protecting Power may pay allowances to protected persons (Article 39(3)).
- 1094 If protected persons are transferred from one Detaining Power to another, the Protecting Power carries out the same tasks as in the case of transfers of prisoners of war (Article 45(3)).

c. Civilians in occupied territory

- 1095 The Protecting Power must be immediately informed of any transfers or evacuations of protected persons (Article 49(4)).
- 1096 The Protecting Power may, at any time, verify the state of the food and medical supplies in occupied territories (Article 55(3)). When the population of an occupied territory is inadequately supplied, the Occupying Power should agree to and, wherever possible, facilitate relief schemes (Article 59(1)). The Protecting Power may be called upon to certify that the relief shipments will be used for humanitarian purposes (Article 59(4)) or, exceptionally, to give its consent to divert relief consignments from their original purpose (Article 60). The Protecting Power supervises the distribution of the relief consignments or delegates this task to an impartial humanitarian body such as the ICRC (Article 61(1)).
- 1097 In terms of judicial guarantees, the Protecting Power must be informed of any legal proceedings taken against protected persons when the charges could result in the death penalty or imprisonment of two years or more (Article 71(2) and (3)). The Protecting Power should be notified of any judgment involving such a sentence; other judgments must be detailed in the court's records and be open to inspection by the representatives of the Protecting Power (Article 74(2)). Apart from the exceptional circumstances set out in Article 75, no death sentence may be carried out for at least six months from the date when the Protecting Power is notified of the judgment; the Protecting Power must be notified of any reduction in that time-frame (Article 75(2) and (3)). If the accused does not appoint a legal counsel, the Protecting Power may do so (Article 72(2)). The representatives of the Protecting Power are entitled to attend the trial unless, exceptionally, this is held 'in camera' in the interests of the security of the Occupying Power (Article 74(1)). The representatives of the Protecting Power may visit accused and sentenced prisoners (Article 76(6)).

d. Civilian internees

- 1098 Here the tasks of the Protecting Power are comparable to those it carries out for prisoners of war.
- 1099 In addition to the visits to places of internment provided for in Article 143, the representatives of the Protecting Power are entitled to receive any complaints or requests from internees (Article 101(2)). They are in contact with the internee committees (Articles 102(1) and 104(3)) and are informed of the reasons for any refusals or dismissals of members of those committees (Article 102(2)). They receive a list of the labour detachments dependent upon the places of internment they visit (Article 96).
- 1100 The Protecting Power may pay allowances to internees and check their individual accounts (Article 98(2) and (3)).
- 1101 The Protecting Power must be duly notified of any restrictions placed on relief shipments for internees (Article 108(2)).

- 1102 The Protecting Power's representatives are entitled to supervise the distribution of relief supplies to internees (Article 109(3); Annex II, Article 8). In certain circumstances, the Protecting Power may organize special means of transport to deliver relief shipments to internees (Article 111(1)).
- 1103 The Protecting Power's representatives may inspect the record of disciplinary punishments ordered against internees (Article 123(5)), and may talk freely to internees undergoing such punishment (Article 125(4)).
- 1104 In terms of judicial guarantees for civilian internees in the national territory of the Detaining Power, the Protecting Power enjoys the same rights as it does in relation to civilians in occupied territory (Article 126).
- 1105 The Protecting Power should receive a report following the official enquiry into every death or serious injury of an internee caused or suspected to have been caused by a sentry, another internee, or any other person (Article 131).
- 1106 Lastly, the Protecting Powers are intermediaries for passing on information regarding the geographical location of places of internment (Article 83(2)), measures concerning the internees' contact with the outside world (Article 105), legal documents addressed to or dispatched by internees (Article 113(1)), death certificates (Article 129(3)) and information about the identity of internees (Article 137(1)).

F. Paragraph 2: Facilitation of the task of the representatives or delegates of the Protecting Powers

- 1107 Article 8(2) obliges the Parties to the conflict to facilitate 'to the greatest extent possible' the task of the representatives or delegates of the Protecting Powers. This is the logical consequence of the obligation set out in the first paragraph.
- 1108 This obligation includes facilitating visa applications and travel arrangements (except in exceptional circumstances) and, in particular, access to protected persons as set out under Article 126 of the Third Convention and Article 143 of the Fourth Convention.
- 1109 It may also be useful for a Protecting Power to be granted access to persons near the front line, such as wounded enemy personnel, prisoners of war or civilians who have not yet been evacuated from that area.

G. Paragraph 3: Limitations on the role of representatives or delegates of the Protecting Powers

- 1110 Article 8(3) is intended to safeguard the rights of the State wherein the Protecting Power's representatives or delegates carry out their duties. Through this paragraph, the 1949 Diplomatic Conference wished to strike a balance between the requirements of humanity and those of national sovereignty.⁷¹

⁷¹ Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, p. 99.

Nevertheless, the Conventions impose this obligation on the Protecting Power's representatives or delegates, making them responsible for assessing the imperative security needs of the receiving State and acting accordingly. The reasons for this are clear. If it was up to the receiving State alone to assess its own imperative security needs, that could give rise to abuses and would give that State an easy way to elude the scrutiny of the Protecting Power.

1111 In the First and Second Conventions, paragraph 3 also contains the following sentence: 'Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.' Thus, a Party to a conflict may not invoke the 'imperative military necessities' it claims to be facing in order to restrict the activities of the Protecting Power in relation to prisoners of war or civilians protected by the Fourth Convention and thereby prevent the Protecting Power from carrying out its duties as enshrined in the Third and Fourth Conventions.

1112 This provision, which appears only in the First and Second Conventions, protects the receiving State and enables it to restrict the activities of the Protecting Power's representatives or delegates.⁷² However, such restrictions may only be an exceptional and temporary measure used in the event of 'imperative military necessities'. The idea of 'military necessity' or 'military requirement' is a key component of the law of armed conflict⁷³ and appears in many provisions of the Geneva Conventions.⁷⁴ Here, however, only 'imperative military necessities' may be invoked in order to restrict the activities of the Protecting Power's representatives or delegates on an exceptional and temporary basis. Although the Geneva Conventions do not give a definition of the term 'imperative', the meaning refers to an absolute constraint that leaves the Party in question with no choice. In addition, those restrictions only apply to the Protecting Power's tasks – in any case limited – involved in helping wounded, sick and shipwrecked military personnel under the First and Second Conventions.

1113 The difference between the First and Second Conventions, on the one hand, and the Third and Fourth, on the other, is deliberate. In draft common article 6/7/7/7, adopted by the Joint Committee of the 1949 Diplomatic Conference, the wording '[t]heir activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities' appeared in the four draft Conventions.⁷⁵ But when the draft came to

⁷² For an example of a situation in which it has been stated that this ground can be invoked, see United States, *Law of War Manual*, 2015, para. 4.25.3.

⁷³ The 1868 St Petersburg Declaration aimed to reach a common agreement on 'the technical limits at which the necessities of war ought to yield to the requirements of humanity'. Similarly, the 1907 Hague Convention (IV) stated that the drafting of the Convention had been inspired 'by the desire to diminish the evils of war, as far as military requirements permit'.

⁷⁴ See e.g. First Convention, Articles 12(4), 30(1), 32(2), 33(2) and 50; Second Convention, Articles 28 and 51; Third Convention, Article 126(2); and Fourth Convention, Articles 16(2), 18(4), 49(2) and (5), 53, 143(3) and 147.

⁷⁵ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, pp. 29–30.

be studied in the plenary meeting of the Diplomatic Conference, the delegate from New Zealand pointed out that it was reasonable that imperative military necessity would cause restrictions to be imposed on the activities of the Protecting Powers in the case of the First and Second Conventions, which were mainly to be implemented on the battlefield or in sea warfare, but that such restrictions could not be invoked in the case of the Third and Fourth Conventions, which were mainly to be implemented in the rear zone, in the territory of the Parties to the conflict or in occupied territory, i.e. after the prisoners of war and the civilian internees had been evacuated from the combat zone. In that case, the restrictions might weaken the new Conventions. His statement gave rise to a discussion, at the end of which the Diplomatic Conference voted to remove this proviso from the Third and Fourth Conventions.⁷⁶

H. Developments since 1949

- 1114 While the Geneva Conventions foresee that the Parties to an international armed conflict entrust a Protecting Power with safeguarding the interests of their nationals in the hands of the adverse Party, the Conventions leave it up to each Party to decide on the course of action to achieve that. In the minds of the drafters of the 1949 Geneva Conventions it was taken for granted that the Parties to the conflict would be keen to take initiatives to ensure the protection of their nationals in the hands of the adverse Party and that the procedure envisaged would be universally followed. This assumption was based on the fact that during the two world wars practically all belligerents had entrusted the protection of their interests and of their nationals to Protecting Powers and on the fact that the State is the natural protector of its nationals. This feature of international armed conflicts was to change dramatically in the era after the end of the Second World War.
- 1115 Since the 1949 Conventions were adopted, Protecting Powers are only known to have been appointed in five conflicts:⁷⁷
- the Suez conflict (1956) between Egypt on one side and France and the United Kingdom on the other;⁷⁸
 - the conflict (July 1961) between France and Tunisia over Bizerte;⁷⁹

⁷⁶ *Ibid.* Vol. II-B, pp. 344–346.

⁷⁷ Even in these five cases, the Protecting Powers were not always able to carry out all the tasks set out in the Geneva Conventions, nor to act on behalf of all the belligerents; see Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, p. 77.

⁷⁸ Switzerland represented the interests of France and the United Kingdom in Egypt, while India represented Egyptian interests in France and the United Kingdom (*Keesing's Contemporary Archives*, 1956, p. 15181; Knellwolf, pp. 291–294). No Protecting Power represented Egyptian interests in Israel, nor vice versa.

⁷⁹ Sweden protected Tunisian interests in France, while Switzerland protected French interests in Tunisia [*Keesing's Contemporary Archives*, 1961, p. 18343 A].

- the Goa crisis (1961) between India and Portugal;⁸⁰
- the conflict (December 1971) between India and Pakistan;⁸¹
- the Falkland/ Malvinas Islands' conflict (1982)⁸² between Argentina and the United Kingdom.⁸³

1116 However, no Protecting Power was appointed during the other conflicts since 1949, depriving millions of war victims of the assistance of a third State and of such form of scrutiny of their circumstances, without which the protection afforded by the Geneva Conventions is all too often illusory. Ultimately, such shortcomings can undermine the whole treaty-based protection system. The efficacy of the rules is at risk when the mechanisms designed to ensure that the rules are implemented are regularly brought to a standstill.

1117 It is therefore necessary to ask why no Protecting Power was appointed in all other international armed conflicts since 1949. In the lead-up to and during the 1977 Diplomatic Conference, many experts and government representatives questioned whether the procedure for appointing Protecting Powers was fit for purpose or overly cumbersome. They highlighted the supposedly optional nature of appointing Protecting Powers, the difficulty of agreeing on a neutral State acceptable to both Parties,⁸⁴ the maintaining of diplomatic relations between adversaries, and the financial burden that the activities of the

⁸⁰ The United Arab Republic protected Indian interests in Portugal, while Brazil had protected Portuguese interests in India since diplomatic relations had broken off in 1955 (*Keesing's Contemporary Archives*, 1961, p. 18635 B).

⁸¹ Both States appointed Switzerland as Protecting Power (*Keesing's Contemporary Archives*, 1972, p. 25054 A; Knellwolf, pp. 294–298). However, Switzerland was only requested to lend its good offices between Pakistan and Bangladesh. Following the suspension of active hostilities, India claimed that Switzerland had been appointed as Protecting Power as defined under diplomatic law only. It used that argument to restrict the activities that the Protecting Power wished to carry out for the 90,000 Pakistani prisoners of war and civilian internees being held in India. Invoking Article 8, Switzerland contested this position and asserted that it was entitled to carry out all the tasks entrusted to Protecting Powers by the Geneva Conventions in the interest of those prisoners of war and civilian internees (Abi-Saab, 1979, pp. 323–324; Knellwolf, pp. 294–298).

⁸² The boundaries, names and designations used in this commentary do not imply official endorsement, nor express an opinion on the part of the ICRC, and are without prejudice to claims of sovereignty over the territories mentioned. Whenever a disputed territory is given different names by the parties concerned, the ICRC uses those names together, in French alphabetical order.

⁸³ Switzerland represented UK interests in Argentina, while Brazil represented Argentine interests in the United Kingdom. In both cases they were charged with representing foreign interests; neither had been formally appointed as Protecting Powers within the meaning of the Geneva Conventions. Nevertheless, the two States worked towards the implementation of the Conventions by performing some of the tasks assigned to Protecting Powers, in particular by forwarding the notification of the commissioning of hospital ships (Sylvie S. Junod, *Protection of the Victims of Armed Conflict, Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, ICRC, Geneva, 1984, pp. 20–21; Knellwolf, pp. 305–306).

⁸⁴ This argument assumes that both adversaries must agree on the same State to be appointed as Protecting Power to safeguard their interests and those of their nationals. This is not the case.

Protecting Power could place on the State calling upon its services.⁸⁵ Article 5 of Additional Protocol I was meant to address some of the shortcomings which had been identified with regard to the implementation of Article 8.

1118 In truth, however, the obstacles do not appear to result from the inadequacy of the procedures nor from the financial burden, but are more likely to be related to political considerations. Among the difficulties encountered were the fear that appointing a Protecting Power would be interpreted as implicitly bestowing recognition on an adversary whose legal existence was disputed; the questioning of the applicability of the Geneva Conventions in the case in point; and a dispute over the existence of an armed conflict or over a Party's involvement in the conflict. Furthermore, the possibility, provided for in common Article 10 (Article 11 in the Fourth Convention), to appoint substitutes for a Protecting Power may also reflect the fact that the drafters anticipated that there might be situations in which the system would not work as intended.⁸⁶

1119 Lastly, most armed conflicts since 1949 have been non-international armed conflicts, for which the Protecting Power mechanism was not as such intended.⁸⁷

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⁸⁵ *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. VIII, pp. 80, 88, 142–143 and 148–150; Abi-Saab, 1979, pp. 323–325.

⁸⁶ For a further analysis as to why the appointment of Protecting Powers has been the exception rather than the rule in international armed conflicts since 1949, see also Kolb, pp. 557–558.

⁸⁷ For details, see para. 1015.

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